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No.

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In The

Supreme Court of the United States

October Term, 1997

VINCENT C. PIANO, a/k/a Vic Piano
and LOUISE PIANO,

Petitioners,

vs.

ALBERT F. NASUTI, Trustee,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an owner of property have a constitutionally guaranteed right to dispose of any part or all of his possessions, either gratuitously or otherwise, at a time when he is not obligated to another and when he has no known or anticipated future creditors.

2. Under New York law, may subsequent indebtedness be invoked to make that fraudulent which was honest and free from impeachment at the time of the transfer.

3. Under New York law must there be definite proof that creditors existed who were able to be defrauded at the time of a conveyance in order to establish that a conveyance was in fraud of creditors.

4. Under New York law, is a transfer fraudulent as to future creditors, where at time of a gift of his property to his wife, husband has no creditors, and no knowledge as to the identity of any future creditor.

PARTIES TO THE PROCEEDING

The parties named in the caption are the only parties before the Court of Appeals, District Court and Bankruptcy Court below.

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Petitioners, Vincent C. Piano and Louise Piano (the "Piano's") respectfully request that a writ of certioriari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, in *Piano et al. v. Nasuti*, Appeal Case No. 97-9164 is not published but is attached as App. A. The opinion of the United States District Court for the Northern District of Georgia in *Piano, et al. v. Nasuti*, Civ. No. 2:96-cv-086-WCO is not published but is attached as App. B. The opinion of the United States Bankruptcy Court for the Northern District of Georgia, in *Nasuti v. Piano, et al.*, Case No. G-94-20539-REB is not published but is attached at App. C.

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") was entered on June 8, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The bankruptcy court determined that there was a fraudulent conveyance pursuant to § 276, New York Debtor and Creditor Law which states as follows:

> Every Conveyance made and every obligation incurred with actual intent, as distinguished from the intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

§ 276 New York Debtor and Creditor Law, McKinley's.

STATEMENT OF THE CASE

This is an action springing from an adversary complaint in a Chapter 7 bankruptcy proceeding in which the Trustee alleges, inter alia, that certain transfers of real and personal property made by Mr. Piano to his wife were fraudulent under the United States Bankruptcy Code and New York Debtor and Creditor Law, specifically § 276 of New York Debtor and Creditor Law.

The primary issue is whether an owner is entirely at liberty to dispose of any part or all of his possessions, either gratuitously or otherwise, at a time when he is not obligated to another and at a time when any such transfer is not subject to question from any source. The notion of fraud as to a future creditor is one peculiar to New York law, and relies upon a finding of actual intent to defraud, hinder or delay a creditor.

Petitioner contends that under New York law, subsequent indebtedness cannot be invoked to make that fraudulent which was honest and free from impeachment at the time, and that the bankruptcy court committed error in ignoring the complete lack of debt of the debtor at the time of the transfer, as well as the debtor's complete lack of knowledge of the identity of any future creditor.

Finally, when the bankruptcy court initially announced its decision it did so in language which demonstrates a reluctance to

find fraud and an admission that the debtor had no way of knowing the identity of the future creditor. Consequently Petitioner contents that although the bankruptcy court's decision recites that it was based upon clear and convincing evidence, in actuality the findings announced by the bankruptcy court were far short of the standard, and contrary to the standard of clear and convincing evidence required by New York law.

A. Statement of the Facts

In November, 1990, Vincent Piano transferred his one half interest in the family home in New York to his wife Louise Piano. (R. at 172.) At the time he was 68 years old, (R. at 64) had no debts, (R. at 636) had no foreseeable future debts, (R. at 636) received a salary in excess of $10,000 per month, (R. at 85) and held 500,000 shares (R. at 86) in a publicly traded company which were being traded in a range of $.75 and $.32 per share during the month. (R. at 453 and 483). The transfer of his one half interest has been alleged to be a conveyance to defraud his creditors, solely because a debt was retroactively created in March, 1994 and backdated to March, 1990. (R. at 634, l. 22 and R. at 637, l. 21.) The fraudulent conveyance allegations were made for the first time in 1995, and flowed from actions taken in June, 1993 by the trustee in the bankruptcy case of Mizlou Communications, Inc. ("Mizlou"). (Plaintiff's Trial Exhibit 17 identified R. at 547 admitted R. at 547.) In February, 1990, Mr. Piano loaned Mizlou $125,000 for a period of three weeks. (R. at 634, l. 22 and R. at 637, l. 21.) The repayment was found to be a preference since Mr. Piano was an insider by virtue of his 6.97% interest in the company at the time. (Plaintiff's Trial Exhibit 17 identified R. at 547 admitted R. at 547.) The only creditor in this case is the New York Trustee Issac Nutovic who obtained a judgment in the amount of $125,384.23 principal plus interest of $45,138.32. (Plaintiff's Trial Exhibit 78 identified R. at 336 admitted R. at 338.) There are no other creditors.

In June, 1993, the United States Bankruptcy Court for the Southern District of New York appointed attorney Isaac Nutovic as bankruptcy trustee, who contended that Mr. Piano had committed a fraud in having the Company repay his loans. After a lengthy adversary proceeding, the New York bankruptcy court found that there was no fraud. (R. at 549). (*In Re: Mizlou Communications Company, Inc., Debtor, Isaac Nutovic, Trustee of the Estate of Mizlou Communications Company, Inc. v. Vincent Piano*, U.S. Bankruptcy Court, S.D.N.Y., Adversary File No. 93-9205A, filed June 28, 1993). On February 24, 1994, the Hon. James F. Garrity, Jr., Bankruptcy Judge, U.S. Bankruptcy Court, Southern District of New York, found that Mr. Piano was a credible witness and that the Trustee failed to prove fraud under 11 U.S.C. § 548, and that the repayment was merely a technical preference under 11 U.S.C. § 547(b).[1] The New York bankruptcy court stated "[W]e, again, want to make very clear that we don't believe that Mr. Piano acted with an intent to defraud or cheat or take advantage of anyone." (R. at 549, l. 4.)

After the New York bankruptcy court rendered its verdict, Mr. Nutovic continued to pursue Mr. Piano in Georgia for the preference judgment, and Mr. Piano was forced to file bankruptcy in an attempt to halt the spiraling legal expenses to defend himself against Mr. Nutovic. The only creditor in the case is Mr. Nutovic. (R. at 625, l. 22.)

B. The Proceedings Below

On May 16, 1995 Respondent Albert F. Nasuti, the Chapter 7 Trustee filed a complaint against Petitioners Vincent C. Piano, and his spouse, Louise Piano, in the United States Bankruptcy Court for the Northern District of Georgia. The complaint as amended alleged, inter alia, that certain transfers of real and

1. *See* page 13 of Plaintiff's Trial Exhibit 17 identified R. at 547 admitted R. at 547.

personal property made by Mr. Piano to his wife were fraudulent under the United States Bankruptcy Code and New York Debtor and Creditor Law.

Following a trial, the bankruptcy court, pursuant to its findings of fact entered on the record on April 29, 1996, rendered judgment on May 1, 1996 in favor of Respondent on count III of the complaint. Specifically, the bankruptcy court found that the transfer in question was made with the actual intent to hinder, delay or defraud future creditors pursuant to 276 of New York Debtor and Creditor Law. In its findings of fact, the bankruptcy court stated that its ruling on this claim was based on a finding of actual fraud by a "preponderance of the evidence."[2]

On May 7, 1996, Petitioners filed a Notice of Appeal to the United States District Court for the Northern District of Georgia.[3]

On October 15, 1996, the district court remanded the proceedings to the bankruptcy court for the limited purpose of allowing the bankruptcy court to clarify and amend its findings of fact and judgment. The bankruptcy court held a hearing on remand on February 4, 1997 and by order dated February 7, 1997, the bankruptcy court amended and clarified its findings of fact announced in open court on April 29, 1996, and its judgment entered on May 1, 1996, to show that Respondent established by

2. The proper standard of proving actual fraud for 276 of New York Debtor and Creditor Law is "clear and convincing" evidence.

3. On May 15, 1996, Respondent filed a motion for order amending findings and amending judgment to reflect the proper standard of review, clear and convincing evidence. The bankruptcy court held a hearing on Respondent's motion on June 26, 1996. At the hearing, the bankruptcy court stated that the court's prior ruling, and hence the judgment, would not change under either standard. The bankruptcy court recommended that Respondent file a motion at the district court level for an immediate remand to allow the bankruptcy court to amend its judgment.

clear and convincing evidence that Petitioner Mr. Piano's transfer of his one-half interest of the real property in question located in Huntington, New York, to Petitioner Mrs. Piano, was a conveyance made with intent to defraud pursuant to 276 of New York Debtor and Creditor Law.[4]

On October 2, 1997, the Hon. William C. O'Kelley entered an order and judgment affirming the judgment of the bankruptcy court, and on October 14, 1997, Petitioners filed a notice of appeal to the United States Court of Appeals for the Eleventh Circuit which affirmed the judgment below on June 8, 1998.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE IT IS ONE OF THE MOST PRIMARY PRINCIPLES OF PROPERTY LAW THAT AN OWNER THEREOF IS ENTIRELY AT LIBERTY TO DISPOSE OF ANY PART OR ALL OF HIS POSSESSIONS, EITHER GRATUITOUSLY OR OTHERWISE, AT A TIME WHEN HE IS NOT OBLIGATED TO ANOTHER AND ANY SUCH TRANSFER IS NOT SUBJECT TO QUESTION FROM ANY SOURCE.

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

It is one of the most primary principles of property law that an owner thereof is entirely at liberty to dispose of any part or all of his possessions, either gratuitously or otherwise, at a time when

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4. The foregoing follows the recitation of proceedings entered by the Hon. William C. O'Kelley on October 2, 1997 (*See* Appendix B).

he is not obligated to another and any such transfer is not subject to question from any source. *In re Vitelli's Estate*, 261 N.Y.S. 266, 268 (Sur. Ct. 1932).

The bankruptcy court committed error in denying the Petitioner his Constitutionally guaranteed right to dispose of his property at a time when he had no debts and no known future creditors.

II.

THE PETITION SHOULD BE GRANTED BECAUSE UNDER NEW YORK LAW, SUBSEQUENT INDEBTEDNESS CANNOT BE INVOKED TO MAKE THAT FRAUDULENT WHICH WAS HONEST AND FREE FROM IMPEACHMENT AT THE TIME.

The bankruptcy court determined[5] that there was a fraudulent conveyance pursuant to § 276, New York Debtor and Creditor Law which states as follows:

> Every Conveyance made and every obligation incurred with actual intent, as distinguished from the intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

§ 276 New York Debtor and Creditor Law, McKinley's.

The bankruptcy court construed New York law as allowing any or all of three separate and distinct basis of intentionally interfering with the rights of a future creditor: (1) to defraud; (2) to hinder; or (3) to delay. The bankruptcy court took great pains to

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5. *See* May 1, 1996 Judgment set forth at Appendix C.

find that Mr. Piano committed no fraud, but found that Mr. Piano intended to delay and hinder his future creditors by transferring his one half interest in the property. (R. at 636, l. 7). The key fact which is to be proved by the evidence is:

> Whether Mr. Piano actually intended to defraud, hinder or delay payment of $125,384.23 to the bankruptcy estate of Mizlou Communications, Inc., on November 27, 1990 when he transferred his one half interest in the family home to his wife.

Under section 276, New York Debtor and Creditor Law, McKinley's, for actually fraudulent conveyance, actual intent to defraud must be proven by clear and convincing evidence. (*Marine Midland Bank v. Murkoff*, 120 A.D. 2d 122, 508 N.Y.S. 2d 17, 20 (A.D. 2 Dept. 1986)). The bankruptcy court in announcing its judgment used the standard of preponderance of the evidence which falls far short of the standard necessary to prove actual fraud.

Under New York law, a "creditor" is a person to whom a debt is owing by another person. *In re Vitelli's Estate*, 261 N.Y.S. 266, 268 (Sur. Ct. 1932). In order to establish that a conveyance was in fraud of creditors, there must be definite proof that creditors existed who were able to be defrauded. *Wantulok v. Wantulok*, 67 Wyo. 22, 214 P.2d 477, 484 (Wyo., 1950).[6]

Where at time of a gift to wife, husband has no creditors, a transfer is not fraudulent as to future creditors unless it is shown that husband intended to put property beyond their reach. *In re Chadwick's Estate*, 154 Pa. Super. 157, 35 A.2d 582, 583 (Pa., 1944).[7] The presumption of fraud from a voluntary conveyance

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6. Wyoming has adopted the Uniform Fraudulent Conveyance Act.

7. Pennsylvania has adopted the Uniform Fraudulent Conveyance Act.

applies only in favor of an existing creditor. *Vail v. Diamond*, 100 N.J. Eq. 393, 135 A. 791, 592 (N.J., 1927).[8] "Future creditor" does not exist, so as to support presumption of fraudulent conveyance based upon fraudulent intent of conveying debtor and existence of present or future creditor at time of conveyance, unless conveying party can reasonably foresee incurring costs of claim or judgment at time of the conveyance. *Leopold v. Tuttle*, 378 Pa. Super. 466, 549 A.2d 151, 154 (1988). Under statute governing conveyances made with intent to hinder, delay, or defraud present or future creditors, as to future creditors the debt must be incurred within a reasonable time after the transfer. *Hicks v. Sovran Bank/ Chattanooga*, 812 S.W. 2d 296, 301 (Tenn. App. 1991).[9]

Therefore according to the cases which have interpreted the status of future creditors in a fraudulent conveyance action, the future debt in this case would not be applicable.

III.

THE PETITION SHOULD BE GRANTED BECAUSE IN ORDER TO ESTABLISH THAT CONVEYANCE WAS IN FRAUD OF CREDITORS, THERE MUST BE DEFINITE PROOF THAT CREDITORS EXISTED WHO WERE ABLE TO BE DEFRAUDED.

There must be actual intent to hinder, delay or defraud creditors. *GAFCO, Inc. v. H.D.S. Mercantile Corp.*, 47 Misc. 2d 661, 263 N.Y.S. 2d 109, 115 (1965). There must be intentional fraud, not alone the hindering and delaying of other creditors from collection of their respective debts, in order to set aside an alleged fraudulent conveyance. *Doehler v. Real Estate Board of N.Y. Bldg.*

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8. New Jersey has adopted the Uniform Fraudulent Conveyance Act.

9. Tennessee has adopted the Uniform Fraudulent Conveyance Act.

Co., 150 Misc. 733, 270 N.Y.S. 386, 395-400 (Sup. 1934).[10] Under New York law, a "creditor" is a person to whom a debt is owing by another person. *In re Vitelli's Estate*, 261 N.Y.S. 266, 268 (Sur. Ct. 1932). Thus the New York trustee was not a creditor at the time of the transfer.

Under New York law, a creditor must prove that a transfer was made with actual intent to defraud. *In re Sol Goodman Co.*, 5 F. Supp. 517, 519 (U.S.D.C., S.D.: N.Y. 1932). If there is not evidence sufficient to show actual intent, conveyance may not be set aside. *Feist v. Druckerman*, 70 F.2d 333, 334 (2d Cir. 1934); *Smith v. Eldridge*, 143 N.Y.S. 87, 89-90 (1913). Actual intent is a necessary element to the cause of action for fraudulent conveyance. *United States v. Paladin*, 539 F. Supp. 100, 104 (U.S.D.C., W.D.: N.Y. 1982); *Trustees of Hamilton College v. Cunningham*, 70 A.D. 2d 1048, 418 N.Y.S. 2d 251, 254 (A.D. 4 Dept. 1979).

The requirement of "actual intent to defraud" consists of deception intentionally practiced to frustrate the legal rights of another. *Southern Industries, Inc. v. Jeremias*, 66 A.D. 2d 178, 411 N.Y.S. 2d 945, 948 (1978). [*See* Tab No. 11]. A conveyance in fraud of creditors must be based on actual intent which may not rest on mere suspicion. *Lupia v. Lupia*, 199 N.Y.S. 2d 733, 735 (1960). [*See* Tab No. 12]. (*See also Service Finance Corp. v. Werber*, 169 A.D. 2d 555, 564 N.Y.S. 2d 408 (A.D. 1 Dept. 1991). (Where a creditor did not consider property which was transferred to be part of debtor's net worth to which creditor might look in event of default, evidence was insufficient to prove actual intent to hinder, delay or defraud either present or future creditors.)

Since the identity of the future creditors was unknown, Petitioner could not possess the requisite intent.

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10. In *Farino v. Farino*, 113 Misc. 2d 374, 449 N.Y.S. 2d 379, 386 (Sup. 1982), the court held that if there is no intent to defraud, there must be actual intent to hinder or delay creditors.

IV.

THE PETITION SHOULD BE GRANTED BECAUSE UNDER NEW YORK LAW, THE STANDARD FOR FINDING INTENTIONAL FRAUD PURSUANT TO SECTION 276 IS CLEAR AND CONVINCING EVIDENCE.

Under New York law, for actually fraudulent conveyance, actual intent to defraud must be proven by clear and convincing evidence. The burden does not shift in actual intent cases. *United States v. McCombs*, 30 F.3d 310, 328 (2d Cir. 1994). (*See also Marine Midland Bank v. Murkoff*, 120 A.D. 2d 122, 508 N.Y.S. 2d 17, 20 (A.D. 2 Dept. 1986).

The bankruptcy court in announcing its judgment used the standard of preponderance of the evidence which falls far short of the standard necessary to prove actual fraud.

This is not a case of constructive intent, but of actual intent. The bankruptcy court stated "I don't want to use the word defraud today . . ." (R. at 636). The bankruptcy court went on to say "But it was — this conveyance was made with the actual intent to hinder and delay these future creditors." The bankruptcy court found that ". . . the equities in this case probably — absent the transfer of the home in New York, are all in your favor." (R. at 625).

The difficulty in this case stems from the bankruptcy court's struggle with the interpretation of New York law. The bankruptcy court stated that:

> I don't know and I'm not finding that you specifically anticipated that a judgment on a preference would be rendered in favor of the Mizlou bankruptcy trustee, and that's not my finding. But

> it is my finding that you anticipated a problem, you anticipated that a creditor might raise its ugly head based upon your past acts.[11] It was not what you anticipated. But I don't see any law that's been brought to my attention, and I read this statute, and it's this Court's finding in accordance with that law, that you don't have to specifically anticipate the creditor that rears its ugly head.

(R. at 634).

The bankruptcy court further stated ". . . I'm not saying you knew where it was coming from and I'm sure it was a great surprise to you that you have this obligation against you." (R. at 636). The bankruptcy court found "You didn't have any debts right then." (R. at 636). The bankruptcy court stated

> [t]he Trustee has convinced me by a preponderance of the evidence that there was some anticipation on your part that someone, some creditor, was going to come after you and get that house that you and your wife had saved for all of your life.

(R. at 633). "Could have been a stockholder derivative suit — I don't think that the right — stockholder suit of some kind, a debenture suit." "And it does bother the Court somewhat, not enough to rule in your favor though, that what you might have anticipated — I think you just generally anticipated a problem, a future creditor." (R. at 634).

The above amply demonstrates the bankruptcy court's doubts as it struggled with the evidence and the application of the New

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11. The "past acts" were not identified by the Court, but it is believed that they consisted of legitimate acts in the usual and ordinary course of business, and not a pattern of fraudulent acts.

York law. The bankruptcy court stated that it was bothered that the debt really wasn't incurred. (R. at 634). This doubt is understandable for the finding of an intent to defraud an unknown and unanticipated future creditor is a concept which is not a part of the bankruptcy law nor even the law of Georgia. In fact, the concept as applied by the bankruptcy court does not even exist in New York.

Black's Law Dictionary, 6th Ed., defines "clear and convincing proof" as:

> That proof which results in reasonable certainty of the truth of the ultimate fact in controversy. Proof which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. Clear and convincing proof will be shown where the truth of the facts asserted is highly probable.

Black's Law Dictionary, 6th Edition, West Publishing Co.

The standard of "clear and convincing" is difficult to measure, for it lies in the vast gray area between a mere tipping of the scales, and near total certainty. The Uniform Rules of Evidence which were promulgated in August, 1953 distinguished three evidentiary burdens as "preponderance of the evidence," "clear and convincing evidence," and "beyond a reasonable doubt."

> "Clear and convincing" evidence should produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. Child v. Child, 8 Utah 2d 261, 268, 332 P.2d 981, 986 (Sup. Ct. 1958). It is questionable whether the standard can be adequately verbalized in greater detail. An effort to do so may

be found in Tapler v. Frey, 184 Pa. Super. 239, 182 A.2d 890, 893 (Super. Ct. 1957), wherein it is said that for evidence to be "clear, precise and indubitable," "clear or convincing," or "clear and satisfactory,"

> . . . the witnesses must be found to be credible, . . . the facts to which they have testified distinctly remembered and the details thereof narrated exactly and in due order, and . . . their testimony . . . so clear, direct and weighty and convincing as to enable either a judge or jury to come to a clear conviction, without hesitancy, of the precise facts in issue.

Aiello v. Knoll Golf Club, 64 N.J. Super. 156, 165 A.2d 531 (Super. Ct. 1960).

The extensive 1974 revision of the Uniform Rules of Evidence is silent as to a definition of "clear and convincing evidence".[12] Further, the undersigned was unable to locate a statutory definition of "clear and convincing evidence" under New York law. However, in the *Matter of Storar*, 52 N.Y. 2d 363, 420 N.E. 2d 64 (Ct. Appeals, 1981), the New York Court of Appeals provided a clarification of "clear and convincing" which it termed the "highest standard applicable to civil cases":

> This standard serves to "impress the factfinder with the importance of the decision" (*Addington v. Texas*, 441 U.S. 418, 427, 99 S. Ct. 1804, 1810, 60 L. Ed. 2d 323) and it " 'forbids relief whenever the evidence is loose, equivocal or contradictory' "

12. It should be noted that neither New York nor Georgia has adopted the Uniform Rules of Evidence.

(*Backer Mgt. Corp. v. Acme Quilting Co.*, 46 N.Y. 2d 211, 220, 413 N.Y.S. 2d 135 385 N.E. 2d 1062).

Matter of Storar, 52 N.Y. 2d 363, 420 N.E. 2d 64 (Ct. Appeals, 1981).

The bankruptcy court initially made its finding of facts by a preponderance of the evidence. (R. at 633, l. 18.) The bankruptcy court found that Mr. Piano did not anticipate the particular creditor which ultimately caused this bankruptcy. (R. at 633, 634 and 635.) The bankruptcy court found that Mr. Piano did not have any debts at the time of the transfer. (R. at 634, l. 22.) The bankruptcy court stated that it based its judgment primarily on one document which was a handwritten draft[13] which was never circulated. (R. at 626.) Petitioners contend that the bankruptcy court committed error by failing to adhere to New York law as it has been construed by the New York courts.

Therefore, while the bankruptcy court has amended its basis for the decision awarding the trustee over three times the amount of his only claim, the announcement is contrary to the findings already made a part of the record in this case. The bankruptcy court's finding of facts and conclusions of law were not clear and convincing, and the facts standing alone were far from clear and convincing to support the case of the trustee. The result now before this Court was reached through hindsight. Under New York law such a result is forbidden.

CONCLUSION

If the status of the law in 1990 was such that fraud may be assumed as to future creditors, then where are the cases discussing such a bizarre conclusion? The issue in this case is incredibly simple:

> **If a person were unable to transfer all of his assets to another person or entity without consideration at a time when he had no debts and no known liabilities then every irrevocable trust would be rendered invalid.**

The only debt which was ever avoided in this case was one which was totally unknown to and unanticipated by the debtor until three years after the fact and over two and one half years after the last transfer of assets. The debtor was never insolvent, nor did any debts go unpaid. The fact is that the only creditor of the estate is the New York Trustee and no other creditor suffered as a result of the transfer. For the reasons set forth above Petitioners respectfully request that this Court grant this petition for a writ of certiorari to review the judgments as being in violation of New York law.

This the 3th day of September, 1998.

Respectfully submitted,

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